IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.391 OF 2005

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Hindustan Lever Ltd. ...Petitioner

v/s.

Skipper Foods Pvt.Ltd. ...Respondent

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Mr.K.D. Parikh with Ms.Alpana Ghone i/b Tejpal & Co. for the Petitioner.

None for the Respondent.

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CORAM: D.K.DESHMUKH, J.

DATED: 22ND MARCH,2006

P.C.:

1. By this petition the Petitioner challenges the award made by the sole arbitrator dated 6th July, 2005 directing the Petitioner to pay to the Respondent an amount of Rs.32,74,800/- with interest. Admittedly there was an agreement between the parties. That agreement contained an arbitration clause. The dispute between the parties was referred to arbitrator. Before the learned arbitrator the Respondent filed the statement of claim. According to statement of claim M/s.Brooke Bond Lipton India Limited, a company registered under the Companies Act, which now stand amalgamated with M/s.Hindustan Lever Ltd., the present Petitioner intended to do business of marketing and selling of Ice-cream in their brand name Dollops. The said Brooke Bond Lipton India entered into an agreement with the Respondent dated 10th May, 1994. According to statement of claim the Respondent, after the agreement was entered into, took all necessary steps to modify their plant and bring it to the standard required by the Petitioner. According to the

statement of claim inspite of best facilities made available by the Respondent, the Petitioner lifted very limited quantity of ice-cream from the factory of the Respondent and thereby committed breach of the agreement dated 10th May, 1994, which resulted in causing loss to the Respondent. It was further claimed in the statement of claim that by the agreement between the parties the Petitioner had satisfied itself that the Respondent has necessary equipments and know-how to manufacture Ice-cream in their Brand name "Dollops", the Petitioner had agreed that they would ensure optimum utilisation of their entire capacity during the period of agreement. It was further claimed that the Respondent had notified to the Petitioner that as per the terms of the contract minimum guaranteed product that was to be lifted by the Petitioner i.e. 50000 ltr. per month was not lifted and that only 10% of the guaranteed quantity was lifted. Despite issuing notice the Petitioner did not lift minimum guaranteed quantity. As a result, according to the Respondent, the Respondent suffered loss and therefore substantial amount was claimed by the Respondent as compensation for the loss suffered by them because of breach of contract committed by the Petitioner.

2. In reply filed to the statement of claim the petitioner denied that in the agreement entered into between the parties there was any assurance given by the Petitioner to lift any minimum quantity of ice-cream per month. It was claimed that there is no term in the contract which assures that the Petitioner will lift any minimum quantity of ice-cream every month. It was claimed that the service of the Respondent was not up to the mark.

3. It appears that parties, apart from filing documents, also led oral evidence and the arbitrator made the award dated 6th July, 2005.

4. The learned arbitrator found that the Petitioner had to lift minimum quantity of ice-cream per month and the Petitioner has committed breach of that obligation and therefore the Petitioner is liable to pay the damages and accordingly the award was made for payment of damages.

5. The learned Counsel appearing for the Petitioner submits that the finding recorded by the learned arbitrator that there was an oral agreement between

the parties in relation to the minimum guarantee is a finding recorded by the learned arbitrator without there being any pleading and evidence led by the Respondent. According to the learned Counsel the finding is not only in the absence of pleading and evidence, but it is in fact contrary to pleading and evidence. The learned Counsel submits that the case of the Respondent in the statement of claim was that the minimum guarantee clause is contained in the agreement dated 10th May, 1994 itself. It was also the case of the witness examined on behalf of the Respondent. But the finding that has been recorded is that there was an oral contract between the parties for minimum guarantee.

6. The Respondent has been served. Affidavit of service has been filed. None appears for the Respondent.

7. With the help of the learned Counsel appearing for the Petitioner I have gone through the record. Perusal of paragraph 14 of the award shows that the learned arbitrator has observed that letters were addressed by the Respondent to the Petitioner pointing out to the Petitioner that the Petitioner

had agreed to lift minimum quantity of ice-cream every month, but the Petitioner has not lifted that quantity of ice-cream and it has resulted in loss to the Respondent. According to the arbitrator these letters were received by the Petitioner, the Petitioner has not replied to those letters and therefore the learned arbitrator has assumed that there was an oral agreement between the parties for lifting of minimum quantity of ice-cream per month by the Petitioner. Now, perusal of the statement of claim shows that in so far as the minimum guarantee clause is concerned, in paragraph 4 of the statement of claim the Respondent stated thus:

> 4. That inspite of the best facilities made available at the plants of the plaintiff company, M/s.Hindustan Lever Limited did not lift and purchase or lifted and purchased very limited quantity of manufactured ice-cream from their plants and stores located at Hisar and thus despite repeated requests and reminders arbitrarily breached the agreement dated 10th May, 1994 and thus caused the plaintiff company huge losses.

8. It is clear from this paragraph that the Respondent was not relying on any agreement except the agreement dated 10th May, 1994 to claim that because of that agreement the Petitioner is under a duty to lift minimum quantity of ice-cream every month. In paragraph 9(A) of the statement the Respondent stated thus:-

> 9(A) That in accordance with the terms of agreement subsisting between the parties, respondent had satisfied itself that claimant had necessary equipment for know how to manufacture Ice-cream in their Brand Name "Dollops" and that respondent had agreed that they would ensure optimum utilisation of their entire capacity of output for manufacturing products required by it during the period of agreement.

9. It is clear from paragraph 9(A) of the statement of claim quoted above that even for contending that the Petitioner would lift optimum quantity of ice-cream manufactured by the Respondent, the Respondent was relying on the subsisting agreement between the parties and not on any oral agreement between the parties. In their reply filed to the

statement of claim the Petitioner had denied that there is any term in the contract/agreement between the parties dated 10th May, 1994 which requires the Petitioner to lift minimum quantity of ice-cream per month or it obliges the Petitioner to lift optimum quantity of ice-cream manufactured at the plant of the Respondent. The sole witness examined on behalf of the Respondent was Mr.Pawan Chopra. Paragraphs 47, 48, 49 & 50 of his deposition, in my opinion, are relevant. They read as under:-

> 47. In para 9 of your Affidavit you have stated that as per the term of the Agreement the minimum guaranteed product to be lifted by the Respondent from the factory of the Claimant was to the extent of 50,000 liters per month. Please point out the term of the Agreement recording this?
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> Ans: There is no term in the Agreement about it. But as recorded in Clause (iv) at page 2 of the Agreement, the Claimant was ensured optimum utilization of the entire capacity output for manufacturing the products required by the Respondent.

48. Do I take it that optimum utilization of the entire capacity output for manufacturing the products required by the Respondent would, according to you, be 50,000 liters per month?

Ans: No.

49. There is no specific term in the agreement providing for minimum guaranteed product to be lifted by the Respondent from the factory of the Claimant to the extent of 50,000 liters per month.

50. The production capacity of Claimant's plant was 6,000 liters per day since the installation of the plant.

10. It is clear from deposition of the sole witness examined on behalf of the Respondent that the Respondent was not relying on any oral agreement or deemed agreement between the parties, but the Respondent was relying on clause (iv) at page 2 of the agreement dated 10th May, 1994 to claim that that clause ensures that the Petitioner should lift 50,000

liters ice-cream per month. Clause (iv) at page 2 of the agreement which is referred to by the witness for the Respondent in his deposition reads as under:-

> (iv) The MANUFACTURERS have represented to the PURCHASERS that they have capacity to manufacture to the requirements of the PURCHASERS during the period of this Agreement for marketing and sales of Ice Cream of various varieties as per specifications/recipes of the PURCHASERS. The MANUFACTURES have further represented that they would be in a position to manufacture and supply uninterruptedly the said requirements of the PURCHASERS during the period of 3 years, from the date of this Agreement. The MANUFACTURES have further agreed that they will ensure optimum utilization of the entire capacity to output for manufacturing the products required by the PURCHASERS during the period of this Agreement and they shall utilize the production capacity of their above unit for any other party only after meeting the total requirements of the PURCHASERS and under due intimation to the PURCHASERS in

writing.

11. Perusal of the above clause shows that it contains no assurance given by the Petitioner, who is described as purchaser in that clause. It refers to assurances which are given by the Respondent. Therefore, there is no question of any obligation cast on the Petitioner to lift any minimum guarantee of ice-cream per month. It is thus clear that from the material available on record that the Respondent was not able to make out the case which was pleaded by them and in relation to which oral evidence was led. Now, perusal of the award shows that the learned Arbitrator has made out a case, which was never pleaded by the Respondent. In paragraph 14(i) of the award the learned arbitrator observed thus:-

> 14(i) According to the Claimant, at the time of entering into the said Agreement the Respondent had guaranteed that the Respondent would lift products minimum to the extent of 50,000 liters per month and by not lifting the products to the extent of 50,000 liters per month, i.e. the minimum guaranteed quantity to be lifted by the Respondent, the Respondent

committed breach of the said Agreement.

12. The case found by the learned arbitrator that assurances for lifting minimum guarantee quantity was given at the time of entering into the agreement was not the case pleaded by the Respondent. The case pleaded was the assurance for lifting minimum quantity of ice-cream was contained in the agreement itself. Perusal of paragraphs 14(ii) and 14(iii) shows that the learned arbitrator has inferred that such an agreement must have been entered into between the parties when they entered into main agreement dated 10th May, 1994 because though the Respondent wrote letters to the Petitioner making grievance about the Petitioner not lifting the minimum quantity of ice-cream, the Respondent did not reply to those letters. In my opinion, the finding recorded by the learned arbitrator suffers from non-application of mind. It was not the case of the Respondent that an agreement to lift the minimum quantity of ice-cream per month was entered into independently of the agreement dated 10th May, 1994. It was not the case of the Respondent that there was such oral agreement between the parties. Question of drawing inference from the correspondence between the parties about

existence of an agreement will come in only after the Respondent proves that there is such an implied agreement between the parties or oral agreement between the parties. It was the case of the Respondent that the term about minimum guarantee is included in the agreement dated 10th May, 1994, and therefore, that case could have been proved only by pointing out relevant terms in the agreement. There is no question of relying on any letters or any oral deposition of any witness. Perusal of the award shows that the learned arbitrator has totally misdirected himself in making out the case which was neither pleaded nor proved by the Respondent.

13. Taking overall view of the matter, therefore, in my opinion, the award impugned in the petition is liable to be set aside and it is accordingly set aside. The Respondent is directed to pay costs of this petition, as incurred by the Petitioner, to the Petitioner.

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